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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARIANE APODACA, Plaintiff and Respondent, v. RAFAEL CHODOS, Defendant and Appellant.	B151503 (Los Angeles County Super. Ct. No. BC235985)

APPEAL from an order of the Los Angeles County Superior Court. James C. Chalfant, Judge. Reversed.

Rafael Chodos, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Rafael Chodos (Chodos), a lawyer, appeals from a May 17, 2001, order imposing on him discovery sanctions in the amount of $1,023, for opposing a motion for protective order and to quash deposition.[1] We agree with appellant that the trial court abused its discretion in concluding under the instant factual and procedural posture that Chodos's opposition was without substantial justification and warranted sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Mariane Apodaca (Apodaca) had a child support order issued in her favor against Lloyd Forcellini (Forcellini); a wage garnishment order had also been issued as to Forcellini's wages from his employment at Las Palmas Productions. Apodaca was apparently not receiving the garnishment checks in a timely manner, so on May 3, 2000, her lawyer contacted Rafael Chodos, the lawyer for Las Palmas. Apodaca's lawyer asked that Chodos arrange with Las Palmas for Apodaca personally to pick up her check that day. Chodos told Apodaca's lawyer that she could pick up her check later that day. Apodaca's lawyer told Chodos that Forcellini had threatened Apodaca with violence and was being assisted in his harassment of her by Las Palmas's bookkeeper, Glenn Sarte (Sarte).

According to Keith Alexander (Alexander), a Las Palmas's employee working in the reception area, Apodaca was waiting at the front desk in the lobby at Las Palmas for her check when Forcellini's current girlfriend, Iveta Kovarik (Kovarik), came up to her and said something which precipitated a physical altercation between the two women. Alexander allegedly called Forcellini to the scene, who then became embroiled in the

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[1] At the time Chodos filed his notice of appeal on July 2, 2001, a summary judgment had been entered in favor of Chodos on June 26, 2001, and his notice of appeal expressly stated that appeal was being made pursuant to Code of Civil Procedure section 904.1, subdivision (b).

physical altercation with his past and present girlfriends. When it was over, Apodaca sustained physical injuries.

In August 2000, Apodaca filed a complaint for damages for assault and battery against Forcellini, Sarte, Alexander, and Las Palmas Productions. Kovarik was named as a defendant but never served. Chodos represented Las Palmas, Sarte, and Alexander. The latter defendants noticed Apodaca's deposition for a date in October 2000; after several new dates were negotiated, Apodaca failed to appear at her deposition scheduled for December 5. Defendants made a motion to compel her appearance at deposition, which motion was granted. In January 2000, Apodaca substituted in new counsel to represent her. When Apodaca failed to appear at her court-ordered deposition, set for February 12, 2001, defendants filed a motion for monetary and terminating sanctions. Finding that terminating sanctions were not warranted at that time, the court again ordered Apodaca to appear for her deposition and awarded defendants sanctions against her for $1,175. Apodaca was deposed on March 30, 2001.

Meanwhile, a trial date was set for July 10, 2001. On March 2, 2001, plaintiff filed amendments to her complaint naming Chodos and his professional corporation as Doe defendants. On March 23, 2001, plaintiff filed a motion for leave to file a first amended complaint, adding new defendants and causes of action. Plaintiff asserted against Chodos, alleged to be an employee and agent of Las Palmas, causes of action for battery, assault, negligence, and intentional and negligent infliction of emotional distress. The motion was supported by the declaration of Apodaca's attorney, Leonard Kohn, who declared that his review of the case "and subsequent inquiry and investigation has determined that the facts of this case require [Apodaca] to amend her pleadings to add causes of action" and to name "further and additional defendants." Hearing on the motion to amend the complaint was set for May 3.

On March 26, 2001, Chodos noticed the deposition of attorney Leonard Kohn for a date in April 2001; the notice requested Kohn to produce, among other documents, any

writings or materials he reviewed in making the inquiry and investigation to which he referred in his declaration in support of the motion to amend the complaint.[2]

On March 28, 2001, Kohn wrote a "meet and confer" letter to Chodos, claiming that the purpose of noticing his deposition was to intimidate and harass him, and the information he sought about the case was available from other sources other than his deposition. Kohn asked Chodos to withdraw the notice for his deposition and stated that Chodos's failure to do so would require him to file a motion for protective order and sanctions. Chodos responded to Kohn's letter by a letter of his own, stating that he was entitled to cross-examine Kohn on the statement in his declaration that he had conducted an inquiry and investigation, and was entitled to know what facts Kohn discovered about Chodos's alleged involvement in the assault and battery. Chodos wrote that unless the court issued a protective order, he intended to proceed with Kohn's deposition.

On April 13, 2001, plaintiff filed motion for protective order and sanctions, which was set for hearing on May 17, 2001.

On May 1, 2001, Chodos filed a "qualified opposition" to Kohn's motion to quash deposition. Chodos admitted therein that between the time he noticed Kohn's deposition and May 1, Apodaca's deposition had been taken and "it is no longer as urgent to Mr. Chodos to take Mr. Kohn's deposition -- unless he persists in proffering testimony . . . ." Chodos also stated that "If Mr. Kohn is not going to be a witness and has no information more than his client has already revealed, he should swear an affidavit to that effect and Mr. Chodos will withdraw the subpoena."

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[2] At about this time, Chodos withdrew from representation of the other defendants, continuing to represent only himself in pro. per., and his professional corporation. On behalf of his professional corporation and himself, Chodos filed a notice he was not opposing plaintiff's motion for leave to file an amended complaint and he answered the first amended complaint on May 11, 2001. In May, Chodos and his professional corporation also filed a motion for summary judgment, which was opposed by Apodaca, but granted by the court after hearing on June 19, 2001. (See fn. 1, *ante*.)

Plaintiff filed a reply to Chodos's "qualified opposition," which did not provide the assurances sought by Chodos. At the hearing on the motion for protective order, the court elicited from Kohn an admission that he had no intention of being a witness in this case. The court granted the motion, quashed the notice of deposition, and awarded plaintiff sanctions against Chodos in the amount of $1,023, pursuant to Code of Civil Procedure sections 2025, subdivision (j)(3), and 2023, subdivision (a)(4)[3]; the court found that Chodos did not act with substantial justification in that he made no showing as to two of the three criteria for taking the deposition of a party's attorney under *Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487.

Chodos filed timely notice of appeal, seeking review only of the imposition of the monetary sanctions.

DISCUSSION

"'Unless otherwise limited by order of the court in accordance with [the discovery statutes], any party may obtain discovery regarding any matter, not privileged, that is

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[3] Code of Civil Procedure section 2023, subdivision (a), provides: "Misuses of the discovery process include, but are not limited to, the following: . . . [¶] (4) Failing to respond or to submit to an authorized method of discovery. [¶] (5) Making, without substantial justification, an unmeritorous [] objection to discovery."

We interpret the trial court's order to contain a clerical error, as section 2023, subdivision (a)(5), cites the appropriate basis for Apodaca's claim for sanctions. Moreover, section 2025, subdivision (j)(3), applies to the situation where a deponent fails to appear for deposition and the noticing party moves for an order compelling attendance. The more applicable basis for seeking sanctions in this case is section 2025, subdivision (i), which deals with motions for protective orders and the imposition of monetary sanctions for unsuccessfully making or opposing a motion for protective order, unless the court finds "that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Section 2025, subdivision (g), also provides for monetary sanctions against any party or person who unsuccessfully makes or opposes a motion to quash a deposition notice unless the court finds the person subject to the sanction acted with substantial justification or other circumstances make the imposition of the sanction unjust.

relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.'" (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012-1013.) The Discovery Act requires that, prior to the initiation of a motion, the moving party declare that he or she has made a serious attempt to obtain an informal resolution of each issue. (*Id*. at p. 1016.) A determination of whether an attempt at informal resolution is adequate involves the exercise of discretion. (*Ibid*.) Among the factors the court should consider are the history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, and the prospects for success. (*Ibid*.) A trial judge's perceptions on such matters, inherently factual in nature at least in part, must not be lightly disturbed. (*Ibid*.)

Mindful of the abuse of discretion standard of review and that the trial court's exercise of discretion is not to be lightly disturbed, we nevertheless conclude that the trial court abused its discretion in imposing sanctions on Chodos under the unique facts of this case. Chodos filed only a "qualified opposition," indicating that he would be willing to forego Kohn's deposition if Kohn assured him that he would not be a witness and had no information other than what his client had already revealed. However, Kohn never gave Chodos answers to his questions until the time of hearing on the motion, when the trial court asked Kohn directly and Kohn admitted that he had no intention of being a witness in this case.

Overwhelming evidence in this record thus reveals that the motion and the expenses incurred in bringing the motion could have been avoided if Kohn had simply responded to Chodos's earlier request for the assurance he sought, instead of waiting until they were before the court on the hearing on the motion. The fact that the trial court felt compelled to clarify the matter by asking Kohn directly whether he intended to be a witness in the case demonstrates that Chodos was not without substantial justification in making his qualified opposition and in seeking from Kohn the same assurance the trial court was able to elicit. The fact that Chodos was not able to meet all the *Spectra-*

Physics requirements, and that his opposition to the motion on *Spectra-Physics* grounds was without merit, does not mean that the imposition of sanctions was mandatory. Where, as here, all the evidence and reasonable inferences therefrom indicate that Chodos did all he reasonably could to resolve the matter informally, and that Kohn easily could have avoided the pursuit of the motion for protective order, the circumstances are such as to make the imposition of sanctions against Chodos unjust.

DISPOSITION

The sanctions order against Chodos is reversed. Appellant to bear his own costs on appeal.

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LILLIE, P.J.

We concur:

WOODS, J.

PERLUSS, J.